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Supreme Court of the United States

OCTOBER TERM, 1957

No. 448

THE MASSACHUSETTS COMPANY, a joint venture composed of SOUTHERN SCRAP MATERIAL COMPANY, LTD., a corporation, M. B. FRIEDMAN COMPANY, a corporation; and EASTERN SCRAP AND SALVAGE COMPANY, a corporation,

Petitioners,

versus

THE STATE OF FLORIDA, by and through RICHARD W. ERVIN, as Attorney General of the State of Florida, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND FOR SUPPLEMENTAL RELIEF.

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI AND SUPPLEMENTAL RELIEF

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

Petitioners' brief sets forth the appropriate rule and statute pertaining to jurisdiction of this court. However, for reasons appearing in the argument to follow, this court is without jurisdiction.

QUESTION PRESENTED

Whether the Court has jurisdiction to hear this cause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Florida Constitution provides:

> "State boundaries.—The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; thence due east to the Chattahoochee river; thence down the middle of said river to its confluence with the Flint river; thence straight to the head of the St. Mary's river; thence down the middle of said river to the Atlantic ocean; then southeastwardly along the coast to the edge of the Gulf Stream; thence Southwestwardly along the edge of the Gulf Stream and Florida Reefs to, and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido river; thence to the place of beginning."

Section 7.17, Florida Statutes reads:

> "Escambia county.—The county of Escambia comprehends all that part of the State of Florida lying to the west and south of a line beginning at the Alabama line where said line crosses the Escambia river; running thence down the thread of said river to Escambia bay; thence along said bay to Deer point, at the intersection of Santa Rosa sound with said bay; thence up said Santa Rosa sound to the range line dividing ranges twenty five and twenty six west; thence south

erly along said range line to the waters of the Gulf of Mexico; provided, that Escambia county shall have jurisdiction of offenses committed on the waters of the Gulf of Mexico adjacent to the shores of Santa Rosa island which lie to the west of a prolongation of said range line separating ranges twenty-five and twenty-six west; and that the counties of Escambia, Santa Rosa and Okaloosa shall have concurrent jurisdiction of offenses committed on the waters of Santa Rosa sound."

Section 705.03, Florida Statutes, provides:

"Disposition of proceeds of sale.—The sheriff shall hold the balance of the proceeds of such sale, after paying to the county judge one per cent of the balance for his services and retaining two and one-half per cent of the gross amount of sale for his commission, for the term of one year and a day, unless the same shall be claimed and the said claim or claims established within said period, and after the lapse of said period the sheriff must pay the same over to the commissioner of agriculture, to be by him paid into the state treasury.

Section 716.01, Florida Statutes, reads:

"Declaration of policy.—It is hereby declared to be the policy of the state, while protecting the interests of the owners thereof, to possess all unclaimed and abandoned money and property for the benefit of all the people of the state, and this law shall be liberally construed to accomplish such purpose."

Title 1, Section 3, USCA provides:

"'Vessel' as including all means of water transportation. The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

STATEMENT OF THE CASE

The State of Florida filed a complaint for injunction in the Circuit Court of Escambia County, Florida, seeking to enjoin the Massachusetts Company, a joint venture, from trespassing upon submerged sovereignty lands of the State of Florida and dismantling or salvaging and removing from its location the derelict and abandoned battleship "Massachusetts" which lies sunken in the Gulf of Mexico off the coast of Escambia County in the territorial waters of the State of Florida. (App. A. of Petition, p. 1). The Petitioner, without obtaining permission from the State of Florida, undertook to salvage and remove the Massachusetts. The State of Florida asserted title to the Massachusetts by virtue of its title to the submerged land. (App. A. of Petition, p. 20).

The Circuit Court denied injunctive relief. The respondents then appealed to the Supreme Court of Florida and on November 16, 1956, the lower court was reversed (App. G. of petition, p. 132) Petitioner filed a petition for rehearing which was granted and on June 12, 1957, the Supreme Court of Florida affirmed its prior decision. (App. M. of petition, p. 167)

ARGUMENT

Lack of Jurisdiction

This court should not take jurisdiction in this cause because:

(1) The case was decided under state law and there was no federal question necessary to a determination of the cause.

(2) The 14th amendment was presented for the first time on petition for rehearing before the Supreme Court of Florida and was not decided by that court.

This cause was decided by the Supreme Court of Florida upon the ground that the Massachusetts was abandoned on sovereignty land of the state of Florida. The Supreme Court of Florida based its decision on the Common Law of England as it existed prior to July 4, 1776. The court by applying the Common Law determined that title to the Massachusetts was in the State of Florida. This was a determination of title to property found on state land, which is governed by state law. This court will respect decisions of the highest tribunal of a state which settle rules of property. *Amis v. Smith, 41 U.S. 303, 16 Pet. 303, 10 L. Ed. 973; Dooley v. Pease, 180 U.S. 126, 45 L. Ed. 457, 21 S.C. 308, affirming 88 F. 446.*

The decision of this cause was based upon state grounds; and even assuming a federal question, its consideration was not necessary to complete determination of the cause. That being the case, this Court will not entertain an appeal if the state ground is adequate. *Radio Station WOW, Inc., v. Johnson, 326 U.S. 120, 89 L. Ed. 2092, 65 S. C. 1475; Lynch v. New York, 293 U.S. 52, 79 L. Ed. 191, 55 S. C. 16.*

Before this Court will take jurisdiction it must be shown that (1) the state court actually decided a federal *question. Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed. 789, 65 S. C. 459; Charleston Federal Sav. & Loan Asso. v. Alderson, 324 U.S. 182, 89 L. Ed. 857, 65 S.C. 624, reh den 324 U.S. 888, 89 L. Ed. 1436, 65 S.C. 863; Copperweld Steel Co. v. Industrial Com., 324 U.S. 780, 89 L. Ed. 1363, 65 S.C.*

1006, and (2) the decision of the federal question was necessary to the state court's determination of the cause. *Black v. Cutter Laboratories, 351 U.S. 292, 100 L. Ed. 1188, 76 S.C. 824; Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed. 789, 65 S.C. 459.*

The first suggestion of the 14th Amendment was made in petition for rehearing before the Supreme Court of Florida. (App. H. of petition, p. 146) Before a petition for certiorari is granted by this court, there must be a showing that the federal question was timely presented in the state court; It is the general rule that a federal question which is raised for the first time in a petition for rehearing in the highest state court is insufficient to grant jurisdiction unless the state court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson, 326 U.S. 120, 89 L. Ed. 2092, 65 S.C. 1475; Herndon v. Georgia, 295 U.S. 441, 79 L. Ed. 1530, 55 S.C. 794, reh den, 296 U.S. 661, 80 L. Ed. 471, 56 S.C. 82; American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. Ed. 231, 53 S.C. 98; Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L. Ed. 382, 44 S.C. 197.* The Supreme Court of Florida did not pass upon the alleged constitutional question presented on rehearing (App. M. of petition, p. 167).

REPLY TO QUESTIONS ARGUED BY PETITIONERS

The questions raised by the petitioner will be presented in the order in which they appear in petitioner's brief.

(1) The Submerged Lands Act of 1953 was directly before the court in *State of Alabama v. Texas, 347 U.S. 272, 98 L. Ed. 689, 74 S.C. 481.* In that case the court quoted

from *United States v. San Francisco, 310 U.S. 16, 29, 30, 84 L. Ed. 1050, 1059, 1060, 60 S.C. 749:*

> "Article 4, §3, Cl. 2 of the Constitution provides that 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'"

By this language the court decided the constitutionality of the Submerged Lands Act of 1953.

There is no conflict between the above case and *United States v. California, 332 U.S. 19, 91 L.Ed. 1889, 67 S.C. 1658.* The latter case was decided in 1946, prior to the enactment of the Submerged Lands Act, and even in that case the court recognized the congressional power to make rules and regulations respecting property belonging to the United States, and stated that neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this area.

(2) The Submerged Lands Act of 1953 settled the question of title to the submerged land in which the derelict and wrecked Massachusetts is imbedded. The constitutionality of this act was settled in *State of Alabama v. Texas, 347 U.S. 272, 98 L.Ed. 689, 74 S.C. 481,* and by virtue of the act, the State of Florida clearly has title to the submerged land, leaving only for determination by the state court the question of title to the derelict. This is essentially a question to be determined by the state court.

(3) The determination of the law of Florida is for the highest court of the state. The Supreme Court of Florida, after thoroughly reviewing this cause, has made its determination.

All of the cases cited by the petitioner in support of this contention were decided prior to the Submerged Lands Act of 1953. There is no question of who has title to the submerged bottom land. There is no constitutional violation of petitioner's rights.

(4) The wrecked and derelict Massachusetts is not a vessel subject to admiralty jurisdiction and maritime law. The trial court found that " . . . the sunken battleship is in such condition it could not be restored to use as a vessel." (App. A. of the petition, p. 25)

The derelict has no relation to commerce or navigation. It is "a dead ship" within the purview of *New Bedford Dry Dock Company v. Purdy*, 258 U.S. 96, 66 L.Ed. 482, 42 S.C. 243, 244, where the court quoted with approval from *U.S. v. The Grace Meade*, Fed. Cas. No. 15,243, as follows:

> "And, generally, it may be held as a principle, that, where the keel, stem, and stern posts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of and old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon the law holds that in such a case it is the old vessel rebuilt, and not a new vessel."

See also *Campbell v. Loznicka* (CCA 5, 1950), 181 F.2d

356, and *Hercules Co., Inc. v. Brigadier General Absolom Baird, 214 F.2d 66.*

In *Hitner Sons Co. v. U.S., 13 Court of Customs Appeals 216*, the court, at page 221, made this very pertinent observation when considering whether or not a ship was a "vessel" within the meaning of Title 1, Section 3, U.S.C.A., viz:

> "It was not used, nor could it be used, in any way, in commerce or navigation, either in itself or in conjunction with other agencies of such commerce or navigation. It was absolutely useless as a means of transportation of persons or property on water and had no possible availability except such use as might be made of the materials of which it was composed, and such fixtures and appliances as might be attached to it."

In this connection *Kilb v. Menke (CCA 5) 121 F. 2d 1013* states that admiralty jurisdiction does not extend ". . . over hulks, or vessels that have been permanently taken out of . . . use." (Page 1014)

Peele v. Merchants Ins. Co., 19 Fed. Cas. 98,104, holds a ship becomes a "wreck" when as a consequence of damage, she is rendered absolutely innavigable or unable to pursue her voyage without repairs exceeding half her value.

The wreck is scrap within the meaning of *Hitner Sons Company v. U.S., supra.* It is obvious that there can be no possible conflict between the maritime law or Federal Constitution, and the controlling Florida statutes. There is no question but that the wreck or derelict lies within the territorial boundaries of the State of Florida and Escambia County. (Article I, Florida Constitution; Sec-

tion 7.17, Florida Statutes, "Submerged Lands Act of 1953", 43 U.S.C.A. 1301, et seq.)

The State's ownership of the lands upon which the wreck or derelict lies and its jurisdiction over such lands, clearly render maritime and federal law inapplicable.

(5) This question has been discussed above.

(6) The Fifth Amendment is a limitation upon the federal government and has no reference to state actions. *Ex parte Whistler, D.C. Wis. (1945), 65 F. Supp. 40, appeal dismissed 154 F. 2d. 500, cert. den. 327 U.S. 797, 90 L.Ed. 1023, 66 S.C. 822, rehearing den. 327 U.S. 819, 90 L. Ed. 1041, 66 S.C. 959.*

Conclusion

The petitioner can show no reason why the Court under applicable decisions should grant writ of certiorari to review this case decided by the Supreme Court of Florida upon the appropriate state law.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF FLORIDA)
)
COUNTY OF ESCAMBIA)

Before the undersigned authority this day personally appeared Ralph M. McLane, who after being first duly sworn, on oath deposes and says: that he is an Assistant Attorney General of the State of Florida and of counsel for the respondents in this cause. That he did on the ..... day of November, 1957, deposit a copy of the foregoing brief in a United States mail box, with first class postage prepaid and addressed to J. McHenry Jones, Counsel of Record for Petitioner, 706 Florida National Bank Building, Pensacola, Florida.

.....

Sworn to and subscribed
before me this ..... day
of November, 1957.

.....
Notary Public
My Commission expires